This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act) TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On December 3, 1991, and December 19, 1991, (hearing officer) presided over this hearing held in (city), Texas. She found claimant (respondent herein) entitled to medical and temporary income benefits as a result of injuries sustained by repetitive action of a rock-crusher machine respondent operated and an injury to his back while clearing the machine of an obstruction. Appellant asserted many errors focusing on issues allegedly raised and considered improperly, sufficiency of evidence, whether appellant had failed to timely controvert, and admission of respondent's evidence notwithstanding respondent's failure to respond to interrogatories.

## DECISION

Finding that the decision and order, together with the findings of fact and conclusions of law upon which they stand, are not against the great weight and preponderance of the evidence, we affirm.

The issues, described by the hearing officer as stemming from the Benefit Review Conference, were: (1) whether the carrier waived its right to contest compensability by failing to timely controvert the compensability of claimant's injury; and (2) whether claimant received an injury on February 15 or (date of injury). The hearing officer also asked each party to state what he thought the issues were.

Respondent was hired by (O G) Construction Company, Inc. (employer) in July 1990 as a maintenance man, who could and did run a rock-crusher machine. Respondent was characterized by the foreman of employer, (H K) (foreman), as a hard-working man. At hearing respondent represented himself, and when asked what he considered the "main issue" to be, stated that it was the problems he had physically, walking and pain in his back, legs, and arms as a result of operating the rock-crusher and an injury received on (date of injury) while on the rock-crusher. At the beginning of his testimony, respondent said that February 15 was the day he thinks problems with his back started; it was not a day of injury, but his problems "occurred over a period of time."

He described a separate injury to his upper back as occurring when he tried to free the feeder chain part of the rock-crusher of a large (over 100 pound) piece of clay, and his feet went out from under him as he shifted his weight. At different points in the record, respondent described either March 28 or (date of injury) as the date of this injury. There were no witnesses to either the continuing injury or the March injury. Respondent states he did tell his foreman of the March injury on the same day it occurred. Foreman did not recall being told and did not make an entry in a work book he kept of various chronological happenings at the site. Foreman did acknowledge that he did not record injuries if there were no need to do an accident report. He also said if there was an immediate need for a doctor, he would make an entry in his book.

Respondent testified that the rock-crusher shook too much and needed to be stabilized. He said he was badly shaken while operating it. Foreman admitted that respondent had repeatedly reported the problem of stabilizing the rock-crusher and that it was repeatedly repaired; he acknowledged that as time passed after coming to Jewett in August 1990, the crusher had to be worked on more. Foreman added, though, that OSHA had written no deficiencies on the operation including the rock-crusher, as recently as approximately two weeks before the hearing.

Respondent visited (Dr. G) on June 20, 1991. Prior to that visit respondent stated he continued to work because "he had to" until June 15. He talked with the foreman on June 17 after hours about the job. That conversation is recalled by foreman as respondent's recital that he had taken all he would and quit. Respondent recalled it as his report of injury on the job - but foreman had nothing written in his work book of a report of injury to respondent on that day. Foreman did agree that just because something is not written down does not mean it was not said.

Dr. G noted no abnormality, but when respondent reported back two weeks later with no improvement in symptoms, Dr. G referred him to an orthopedic surgeon and also to have "EMS/nerve conduction studies of the paralumbar region to both legs." Dr. G's statement also points out that the orthopedic surgeon was not seen until August 20, 1991 and the studies were never done. This doctor states that he cannot rule in or out as a cause of respondent's symptoms either the work-related injury of "(date of injury)," or respondent's degenerative osteoarthritis.

Respondent testified that when he went for his appointments in regard to Dr. G's referrals he was told they were cancelled. He had met with a representative of Amerisure (of which Michigan Mutual Insurance Company is a part) and answered his questions on July 17. After that meeting, when he was going to see his referral appointments on the same day, he was told by the hospital of the cancellation. He added that at that time his medical care was being handled under his health insurance but that appellant had cancelled them. At the December 19, 1991 date of hearing, respondent presented a "Workmen's Compensation Information Sheet" of King's Daughters Clinic to which respondent testified showed he was referred by Dr. G which had writing at the bottom "Investigating to reschedule for next week per (Mr. M) at Amerisure." Respondent also offered a copy of a check stub payable to him showing indemnity payments with an envelope with Amerisure Companies as its return address.

Appellant's assertion of errors will be approached in chronological order. In Finding of Fact 8, the hearing officer found that appellant did not file TWCC Form 21 (Notice of Refused/Disputed Claim) within the time period required by Article 8308-5.21 of the 1989 Act and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § § 124.2, 124.4 and 124.6 (Rules 124.2, etc.). This finding means that under Article 8308-5.21 appellant has waived its right to contest compensability since it did not notify the Commission of its refusal to pay within 60 days of receipt of written notice of the claim. Evidence of record to support this finding is Employee's Notice of Injury dated June 25, 1991, together with appellant's Notice of Refused Claim dated December 3, 1991, which states on its face that written notice of injury was received on July 20, 1991. (We view appellant's statement on the Notice of Refused Claim that "due to the finding of evidence that could have been reasonably discovered earlier.", as not what appellant really wanted to say, in recognition of the appellant's stance on this issue at hearing, and do not view it as an admission.) Unless under Article 8308-5.21 the hearing officer had found that delay was based on newly discovered evidence that could not have been reasonably discovered earlier, no issue as to compensability remained after September 18, 1991 (60 days from receipt of notice). *See* Texas Workers' Compensation Commission Appeal No. 91035 (Docket No. AU-00056-91-CC-1) decided November 7, 1991. Her decision not to find that certain evidence could not reasonably have been found earlier is also supported by evidence that respondent gave a statement to Amerisure on July 17 and thereafter in July was asked by Amerisure to release Dr. G's records. Whether or not Amerisure chose to pick up Dr. G's records, the hearing officer did

not have to find that Dr. G's records were not reasonably available until the date of the Benefit Review Conference (BRC) as appellant argues. Even had appellant not cancelled respondent's appointments in July 1991, respondent's testimony indicates that appellant cancelled Temporary Income Benefits (TIBs) in September 1991. While Rule 124.4 requires a carrier to notify the Commission within 10 days of cancelling payments of TIBs, there is no evidence that such notice was given. The main impact of such cancellation for this panel to consider, however, is that cancellation of TIBs in September also tends to negate the argument that evidence to contest compensability could not have been discovered prior to the date of the BRC, October 10, 1991. The appellant's act of cancelling shows either that evidence was available to appellant, or if appellant's assertion that the evidence was not available is accepted, that appellant acted arbitrarily in cancelling TIBs. Evidence that the respondent asked for a BRC on September 16, 1991 because his "comp has been stopped" was also duly admitted and further corroborates that TIBs were stopped in September. As a result, appellant's Notice of Refusal dated December 3, 1991 was also over 60 days past the September act of cancelling TIBs. We note in arriving at this point that the hearing officer did not admit Claimant's Exhibit 2, the written material as to payment of TIBs and the written material as to cancellation of respondent's appointments with referral doctors because, contrary to representations in the decision, the audio record shows no admittance of Claimant's Exhibit 2. While the hearing officer may have erroneously considered Claimant's Exhibit 2, respondent's testimony as to events reflected in these documents was in evidence. With essentially the same information available to her, the whole case did not turn on consideration of documents not in evidence. This is not reversible error. Atlantic Mutual Ins. Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

Appellant also states that issues were incorrectly considered. First, the issue as to repetitive trauma was not stated as such on Notice of Employee's Claim. An injury occurred on February 15 according to that Notice. However, respondent's description of this injury at the hearing, shown at page 2 of this decision, shows it to be "repetitive." His statements at the contested case hearing are not inconsistent with the Benefit Review Officer's Report which states the "Claimant's Position" to be "Claimant states when the rock crushing machine was moved to (city) (Texas) on August 29, 1990, and set up on "soft" soil, the vibrations of the rock crusher he operated became so severe he injured his back." While the appellant did not specifically object to this issue at the time it was framed at hearing, he listed his own three issues for the hearing officer, which included whether a single injury occurred on February 15. He also stated that an issue of appellant's ability to contest the claim was before the hearing. His last stated issue was as to TIBs - he said there was no evidence of entitlements to TIBs. To this statement the hearing officer said to the effect - are you saying there is no disability? The appellant replied in the affirmative. Appellant also asserts that the BRC report refers to injury on (date of injury), not on March 28, as respondent, at times, testified to. The date alleged does not have to be the date found by the hearing officer as the date of injury. The hearing officer is charged with considering all the evidence to determine when injury occurs. *See* Texas Workers' Compensation Commission Appeal No. 91097 (Docket No. TY/91-079846/01-CC-TY41) decided January 16, 1992. The first session of this hearing put all parties on notice that the date of injury was March 28, and pleadings, as such, are not required by the 1989 Act. *See* Texas Workers' Compensation Commission Appeal No. 91123 (Docket No. DA-081465-02-CC-DA31) decided February 7, 1992. In this case appellant was able to query the same foreman about business conducted or not conducted at the same site on either March 28 or (date of injury). In addition, a continuance was granted during which time appellant could have produced more evidence. Appellant also states that no award of benefits should have

been made based on the issues. However, appellant itself raised the issue of TIBs and disability. These issues, the date of the March injury and the question of disability, along with the one on repetitive trauma were considered to be under dispute at the hearing, were litigated, and were decided by the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 91132 (Docket No. HO-A086992-01-CC-HO42) decided February 14, 1992. With evidence in the record as to disability and TIBs, the hearing officer was also required by Article 8308-6.34(g) to determine whether benefits were due and to award benefits. *See* Texas Workers' Compensation Commission Appeal No. 91002 (Docket No. TY-00003-91-CC-01) decided August 7, 1991. Finally appellant references evidence in the statement of Dr. G that raises a sole cause defense (that degenerative osteoarthritis caused all of respondent's problems) to the injuries. The evidence of Dr. G was equivocal (at most he said, "His back films were suggestive of mild degenerative osteoarthritis. However, I cannot, nor did I, attribute his symptoms to degenerative osteoarthritis."); the hearing officer was not obligated to make a finding as to sole cause based on this evidence and her decision does not require it.

Appellant next states that there was insufficient evidence to support certain findings. The evidence of disability appears in respondent's testimony that he could no longer work after June 15, 1991. In addition appellant said he was in pain and said Dr. G recommended he not operate the rock-crusher or he would be crippled. Appellant also says there is no medical evidence of injury to respondent's back nor of repetitive trauma causing injury to his back, legs, and arms. Medical evidence is only required to support a finding of injury on the job in cases where causation is not understandable to a layman. Parker v. Employer's Mutual Liability Ins. Co., 440 S.W.2d 43 (Tex. 1969). An injury to the back occurring on March 28 is sufficiently supported by evidence from the respondent himself. In addition the medical evidence does not contradict a work-related cause and does show that respondent reported the injury as work related. Repetitive trauma injuries have been found by this panel when evidence of causal connection exists between the employment and the disease. Texas Workers' Compensation Commission Appeal No. 91026 (Docket No. EP-00003-91-CC-1) decided October 18, 1991. In contrast, this panel has found, in affirming a determination of no repetitious trauma, that evidence did not establish a causal link when no testimony made that connection and appellant's doctor indicated that the injury was not related to employment. Texas Workers' Compensation Commission Appeal No. 91113 (Docket No. HO-A091722/01-CC-BC41) decided January 27, 1992. Dr. G's statement, as related by respondent (Article 8308-6.34(e) of the 1989 Act says conformity to the legal rules of evidence is not necessary) that respondent's medical problems would be made more severe to the extent of being crippling, by his continuing to operate the crusher, provides enough evidence for the hearing officer to reasonably infer that the same forces that would cripple respondent had also contributed to respondent's injuries. Harrison v. Harrison, 597 S.W.2d 477 (Tex. Civ. App.-Tyler 1980, writ ref'd n.r.e.) and Director, State Employees Workers' Corp. v. Wade, 788 S.W.2d 131 (Tex. App.-Beaumont 1990, writ denied).

Findings of fact and conclusions of law, said to be in error, will be briefly addressed in light of prior discussion herein.

Findings of Fact 4, 5 and 7:

4.On (date of injury), claimant injured his back while attempting to remove a ball of clay from the jaws of the rock-crusher.

5.Claimant has been unable to work from June 17, 1991 to the date of this

Contested Case Hearing because of his injuries.

7.The carrier canceled scheduled diagnostic tests in July, 1991 and did not provide any medical benefits for claimant's injuries.

are sufficiently supported by testimony of respondent and medical documents of Dr. G and/or Dr. R. The hearing officer is the sole judge of the weight of evidence. Article 8308-6.34(e) of the 1989 Act. As trier of fact she judges credibility, assigns weight, resolves conflicts and inconsistencies; in doing so she may believe all, part, or none of the testimony including that of respondent or foreman. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). Dr. R's records also show respondent's symptoms continued through November 21, 1991 when he saw him. In addition, Finding of Fact 7 was primarily directed at the issue of appellant's acts as indicative of knowledge of evidence at least four months predating the filing of Notice of Refusal to Pay.

Conclusions of Law 5 and 6:

5.Claimant received a repetitive trauma injury that is compensable under the 1989 Texas Workers' Compensation Act.

6.Claimant received an injury to his back on (date of injury) that is compensable under the 1989 Texas Workers' Compensation Act.

are sufficiently supported by findings of fact and evidence of record discussed previously in this decision and are consistent with prior Appeals Panel decisions cited herein.

The decision and order address benefits consistent with evidence submitted and Article 8308-6.34(g) of the 1989 Act. While appellant says he objected to any discussion of income benefits, the record shows he named TIBs as one of the issues for resolution when asked by the hearing officer to name the issues. Furthermore, under Article 8308-4.21 an employee is entitled to income benefits to compensate the employee for a compensable injury as provided in Chapter B of Article 4 of the 1989 Act.

The appellant strenuously objected to the admission of Respondent's Exhibit 1 and his testimony since respondent did not answer interrogatories. The hearing officer queried respondent as to why he did not answer, and he replied he did not understand them. There is no evidence that these interrogatories were anything other than the form interrogatories prepared by the Commission. This panel gives hearing officers great latitude in deciding whether good cause has been shown for failure to comply with rules such as this. Nevertheless, it would have been helpful if added questions had been asked as to what was not understood in the interrogatories or why it was not understood. Answers to these questions could have provided more meaningful information on which to base a decision as to whether good cause was shown. We note that appellant repeatedly queried the hearing officer about whether Commission rules would be enforced and she correctly said that they would, pointing out the good cause provision. We also note the continuance she granted to submit more evidence.

We also have to review her finding of good cause in light of two other considerations. First, since the appellant did not timely file its Notice of Refusal consistent with Article 8308-

5.21 of the 1989 Act and Rules 124.2, 124.4, and 124.6, appellant has waived its ability to contest compensability. In considering application of these rules, we note that no Notice of Termination of Compensation was offered in evidence by appellant when payment of TIBs was stopped in September 1991. Second, appellant's cover letter to respondent sending the interrogatories is clearly dated November 18, 1991. Further, it states on its face that the contested case hearing was set for December 3, 1991. Rule 142.13 "Discovery" at subparagraph (d) clearly states that interrogatories "shall be presented no later than 20 days before the hearing." This, appellant failed to do but the respondent, pro se, did not object to such failure to comply with the rules. We note no agreement between the parties to submit interrogatories within another time period. We note no exceptions in the rule applicable to the circumstances of this case. We also note no offer to show good cause for additional discovery as provided for in Rule 142.13(f). Finally, we note that the BRC was held on October 10, 1991, and the hearing was scheduled for, and did begin on, December 3, 1991; this period allowed time for interrogatories in conformance with the rules. In this instance appellant's failure to comply with Rule 142.13(d) in presenting interrogatories, while not objected to at hearing by the pro se respondent, was another factor in the hearing officer's assessment of whether good cause existed. She had sufficient evidence before her to determine that respondent should be allowed to testify and to consider his documentary evidence.

The decision is not so against the great weight and preponderance of the evidence as to be manifestly unjust or wrong. International Ins. Co. v. Torres, 576 S.W.2d 862 (Tex. App.-Amarillo 1978, writ ref'd n.r.e.) and is affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge